IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-610

DON B. HARDING,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Sixth Circuit Court of Appeals

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The petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit.

I

OPINIONS BELOW

The petitioner was convicted in the United States District Court, Western District of Tennessee, for violation of 18 U.S.C.

Section 1951. The judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on September 29, 1977; a copy of the opinion is appended to the petition in the Appendix at pp. A-1-A-15 with a copy of the judgment appended at pp. A-16-A-17.

II

JURISDICTION

The petition for Writ of Certiorari is filed within thirty days from the judgment entered herein. Jurisdiction of this Court is invoked under U.S.C. § 1254 (1).

III

QUESTIONS PRESENTED

The sole issue presented by this petition is whether or not the prosecution and conviction of petitioner by Federal authorities constitutes, under 18 U.S.C. § 1951, an unconstitutional expansion of Federal authority into state and local affairs under Article 1, Section 8, Clause 3 of the **United States Constitution.**

IV

STATUTES INVOLVED

18 U.S.C. § 1951

Interference With Commerce By Threats or Violence

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

"(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining."

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 of sections 151-188 of Title 45."

United States Constitution
Article 1, §8—Powers of Congress

"[3] To regulate commerce with foreign nations, and among the several states, and with Indian tribes;"

V

STATEMENT OF THE CASE

On May 17, 1976, petitioner, Don B. Harding of Nashville, Tennessee, was charged in a two-count Federal indictment, with a violation of Title 18, *United States Code* § 1951. Petitioner at this time and during the period of time as alleged within both counts of the indictment was Executive Director of the Tennessee Real Estate Commission located in Nashville, Tennessee.

Proof at trial evidenced the fact that petitioner, after being contacted by one Brenda K. Johnson, a resident of Memphis, Tennessee and an affiliate real estate broker, hereinafter called Johnson, who was inquiring as to why she had been unable to pass the Tennessee Real Estate Brokers' Exam, offered at a meeting in Memphis to sell copies of the brokers' exam and answers to Johnson for the sum of $300.00. At this meeting, Johnson was given the brokers' exam; however, petitioner returned to Nashville without receiving the agreed sum for the banks were closed on this date due to a legal holiday. Johnson, thereafter notified the United States Attorney's Office in Memphis, and then was placed in contact with agents of the Federal Bureau of Investigation who secured Johnson's cooperation in later meeting petitioner in Jackson, Tennessee, where the agreed sum which had been supplied to her by agents of the Federal Bureau of Investigation passed hands.

The proof further showed that agents of the Federal Bureau of Investigation approached one Donald Nasca, a resident of Memphis, Tennessee, hereinafter referred to as Nasca, who had

also, on occasions in the past, failed the brokers' exam, and enlisted Nasca's support by preparing and writing a letter for his signature on his employer's stationery, which requested information of petitioner as to how he might better prepare himself for the exam. The proof showed that petitioner, in response to this letter, subsequently arranged to sell a copy of the exam and answers to Nasca for the sum of $300.00. The transaction consummating the arrangement between petitioner and Nasco occurred in Jackson, Tennessee, with the purchase being made with money supplied by the Federal Bureau of Investigation.

Subsequent to these actions and following the indictment, the District Court hearing the matter without a jury found petitioner had violated the provisions of 18 U.S.C. § 1951 and returned a guilty verdict on both counts of the indictment. The Court then sentenced petitioner to six months' confinement as to each count with sentences to run concurrently and fined petitioner the sum of $1,000.00 on each count.

It is undisputed that all acts occurring between petitioner, Johnson, and Nasca took place entirely within the State of Tennessee. The proof introduced at trial by the United States Government as to interstate activity concerned itself with the fact that real estate listings are contained in the Memphis daily newspapers, which are circulated outside the State and it is not an uncommon occurrence for real estate agents to sell or arrange for purchases of real estate either to individuals moving into or out of the State.

VI

REASONS FOR GRANTING THE WRIT

Petitioner believes that the decision of the Sixth Circuit Court of Appeals constitutes an unwarranted infringement into matters of state and local concern outside the scope and breadth of Article 1, Section 8, Clause 3 of the *United States Constitution*.

The Sixth Circuit Court of Appeals relies upon the decision of *United States v. Staszcuk*, 517 F. 2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975), in applying the "de minimis rule" in its finding that the actions of petitioner had an impact upon interstate commerce. In an application of this rule, as interpreted by *Staszcuk*, no more than a "realistic probability" that certain actions may affect interstate commerce need be shown in order to satisfy requirements of 18 U.S.C. 1951.

The Court concluded from trial testimony that certain actions which were never shown to involve petitioner, involving the sale of real estate within the Memphis market had an affect across state lines; however, there was a complete lack of proof, nor did the Court of Appeals point to any item evidencing the fact that petitioner's particular actions or any results flowing therefrom constituted an affect upon interstate commerce.

The Act itself reads as follows:

> "(a) Whoever in any way or degree *obstructs, delays*, or *affects* commerce or the movement of any article or commodity in commerce . . ." (Emphasis added)

It is petitioner's belief that the Court in supporting the "de minimis rule" ignores the ordinary meanings of the words obstruct, delay and affect, which by their plain meanings imply that there must be some affect or impact upon interstate commerce, however, insubstantial, rather than a mere potentiality as the Court finds here by its application of *Staszcuk*.

As the dissent in *Staszcuk* pointed out at page 63:

> "That The Hobbs Act which was aimed at a specific evil, is sufficiently broad to catch in its net other extortionists whose nefarious activities do in fact affect commerce does not signify to me an intention on the part of Congress, even if Congress has the constitutional right which is not at all clear, to extend the exercise of legislative power to local activities which have no effect whatsoever on interstate commerce. . . ."

By holding that a potential effect on commerce gives the government prosecutor jurisdiction, the Court of Appeals joins in an expansion of the power of the Federal system into traditional areas of local state concern.

Petitioner recognizes the fact that Congress was granted by the Constitution the power to regulate commerce among the several states, with regulation of purely intrastate economic activity permitted when that activity directly affects interstate commerce. Further, Courts have frequently sustained Federal criminal statutes proscribing the misuse of the channels of interstate commerce and protecting the instrumentalities of commerce, the judiciary traditionally, however, has disapproved legislation punishing local criminal conduct that incidentally affects interstate commerce absent exceptional circumstances. (See 28 *Vand. L. Rev.* 1348 (1975) at p. 1350, with footnotes.)

As stated in *Vand. L. Rev.*, supra, at p. 1350:

> "This judicial reluctance to ex[1351]tend the reach of federal commerce power to local crime derives from the American system of federalism which historically has al-

located the power to define and punish crimes to the states."

Petitioner asserts that judicial decisions such as the one under consideration create an unconstitutional infringement into matters of state and local concern which should be left to the State of Tennessee, who in the instant matter was never given the opportunity for action. Petitioner believes that the problems and dangers associated with continued Federal incursion into matters which are and should be of local concern, and which should be left to the consideration and talent of local prosecutors, is best expressed in the herein cited *Vand. L. Rev.*, which points out the dangers that arise in the Court's decision, wherein it is stated at p. 1359:

". . . One major weakness in the Court's analysis was its underlying assumption that Congress is empowered under the commerce clause to reach purely local activities that probably would have affected commerce; such a proposition remains unsupported by precedent. Furthermore, a significant omission in the opinion was the Court's failure to draw the traditional distinction between federal commerce power in the economic and criminal realms. While the Court correctly discerned that Congress intended to exercise its plenary constitutional power in The Hobbs Act, it failed to recognize that full commerce power in a criminal context historically has never been commensurate with the wider scope of commerce power in the economic realm . . . the legislative history of the statute gives no indication that elimination of local political corruption was specifically contemplated by the drafters of either The Hobbs Act or the Anti-Racketeering Act . . . The instant Court, however, failed to demonstrate that state officials were either unwilling or unable to prosecute the defendant for extortion . . . The Court failed to consider the extent to which local authorities are better situated to control essentially local

crime, limited federal resources may be drained by federal enforcement efforts, state authorities may relax prosecution of robbery and extortion, and the existing federal-state balance of criminal jurisdiction may be altered. Finally, the instant decision was impaired by the failure to specify adequate guidelines for implementing the 'realistic probability test' ".

The Tennessee Legislature has set forth within Chapter 13 of the *Tennessee Code Annotated* detailed statutes dealing with the regulations and control of real estate brokers. The *Code* at Section 62-1330 goes so far as to require a non-resident applicant for a broker's license to file an irrevocable consent to allow legal actions to be commenced against the non-resident in the proper Court of any county of Tennessee in which the cause of action may arise. It is thus apparent that the State of Tennessee considers the sale of real estate within its borders to be of paramount local concern and that as far as Section 62-1330 is concerned, the legislature felt the Courts of this State to be the proper forum to resolve disputes.

The Federal Government has not promulgated legislation or guidelines applicable to real estate brokers or the sale of real estate; thus, it is apparent that the licensing of brokers and the sale of real estate is of paramount state concern.

In *Robertson v. People of State of California*, 328 U.S. 440 (1948), this Court dealt with an appeal from a conviction for violation of certain statutes of the California Insurance Code requiring the licensing of insurance agents for non-admitted insurers selling policies of insurance within the State. The appellant attacked the convictions as a regulation of interstate commerce forbidden by the commerce clause of the Constitution, Article 1, Section 8.

The Court at p. 448 stated:

"In the absence of contrary action by Congress, a state may license agents or brokers for the sale of interstate transportation in order to prevent fraud . . ."

"That appellant's activities were of a kind which vitally affect the welfare and security of the local community, the state and their residents could not be denied. They have in fact a highly 'special [449]* interest' in his localized pursuit * of this phase of the comprehensive process of conducting an interstate insurance business. Here, as in each of the instances cited, appellant's activities called in question were concentrated in the regulating state, although affecting or constituting interstate commerce . . ."

Significant is the fact that *Robertson* is a criminal case and the statutes involved of a regulatory nature. In the matter before the Court, the State of Tennessee has detailed specific legislation applicable to the sale of real estate with the Congress of the United States yet to act.

It is petitioner's assertion that the activities involved herein are those which vitally affect the welfare and security of the local community with the determination as to whether or not a law has been violated being properly left to local authorities.

VII

CONCLUSION

Petitioner, Don B. Harding, respectfully requests this Court to reverse the decision of the Sixth Circuit Court of Appeals in that prosecution and conviction of petitioner by Federal authorities and the affirmance of that conviction by the Sixth Circuit Court of Appeals evidences an unwarranted and unnecessary intrusion into the affairs of the State of Tennessee by reason of an unconstitutional expansion of Article 1, Section 8, Clause 3 of the *United States Constitution*.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals has been served on the Solicitor General, Department of Justice, Washington, D.C. 20530, by forwarding a copy of same by U. S. Mail, postage prepaid, to his office address, this 25 day of October, 1977.

. . . . . .
Edward A. Kizer

APPENDIX

APPENDIX A

No. 77-5030

United States Court of Appeals
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Don B. Harding,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed September 29, 1977

Before: Phillips, Chief Judge; Engel, Circuit Judge, and Freeman, Senior District Judge.*

Ralph M. Freeman, Senior District Judge. Appellant Don B. Harding, urging this Court to re-examine the scope of the statute under which he was convicted, challenges the application of 18 U.S.C. § 1951, commonly known as the Hobbs Act, to his allegedly criminal activity.

Harding was the executive director of the Tennessee Real Estate Commission, one function of which is to issue licenses to real estate brokers and affiliate brokers. Harding, as execu-

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* Honorable Ralph M. Freeman, Senior Judge, United States District Court for the Eastern District of Michigan sitting by designation.

tive director, was the office manager of the Commission office located in Nashville, Tennessee. He was not a member of the Commission itself and therefore had no authority or discretion to issue licenses.

In January, 1976, Harding received a letter from Brenda Kaye Johnson, a licensed affiliate broker who had just failed in her third attempt to pass the Tennessee real estate brokers' licensing examination. Ms. Johnson wrote to Harding because his name appeared on the letter which had notified her of her failure, and she wanted to discuss the matter with him. Harding's secretary telephoned Ms. Johnson and arranged for a meeting between Harding and Ms. Johnson at the Hyatt Regency Hotel in Memphis in mid-February, 1976. At that meeting, Harding suggested that he could assist Ms. Johnson in passing her brokers' exam by selling her a copy of the questions and answers for $300. Although Ms. Johnson agreed to that arrangement, she reported the incident to the FBI, who then enlisted her cooperation in investigating Harding's activities. The tape recorded a conversation during which Harding arranged another meeting with Ms. Johnson, and also tape recorded the meeting at which Ms. Johnson paid him $300 supplied by the FBI in exchange for the brokers' exam.

In furtherance of the investigation into Harding's misconduct, the FBI contacted Donald Nasca, who had also twice failed the Tennessee real estate brokers' examination. Nasca cooperated with the FBI in sending Harding a letter similar to Ms. Johnson's requesting assistance in passing the brokers' examination. Harding then called Nasca and offered to sell him a copy of the exam. In April, 1976, Nasca met with Harding in Jackson, Tennessee, and gave him money provided by the FBI to purchase the exam; he also tape recorded the entire transaction.

The sole question on appeal in this case is whether Harding's conduct is cognizable as extortion under the terms of

the Hobbs Act, 18 U.S.C. § 1951. The statute provides as follows:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

The defendant raises two issues concerning the scope of the Hobbs Act. First, defendant claims that the offending transactions were not shown to have the requisite effect on interstate commerce. Secondly, defendant suggests that his activity does not constitute the obtaining of property "under color of official right" because he in fact had no power to issue a broker's license and the other parties involved did not believe he had such power.

As part of this contention defendant suggests that his conduct was never intended to be encompassed within the scope of the Hobbs Act because it involves common law bribery rather than extortion as defined in the statute.

The statute itself provides in subsection (a) that "[w]hoever *in any way or degree* obstructs, delays, or affects commerce . . . by robbery or extortion . . . shall be [guilty of a felony]." (emphasis added). Many courts have considered whether the showing of a minimal effect on interstate commerce will satisfy the requirements of the Act, and all have agreed that it will. In *United States v. Staszcuk*, 517 F.2d 53 (7th Cir.), cert. denied 423 U.S. 837 (1975), the Seventh Circuit held *en banc* that federal jurisdiction under the Hobbs Act was satisfied by showing that at the time of the offense there was a realistic probability that the robbery or extortion would have affected interstate commerce. This was an expansion of their earlier holding in *United States v. DeMet*, 486 F.2d 816, 821-22 (7th Cir. 1973), cert. denied 416 U.S. 967 (1974); and *United States v. Braasch*, 505 F.2d 139, 147 (7th Cir. 1974), cert. denied 421 U.S. 910 (1975), that "[b]ecause Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimus* effect on commerce may nevertheless be punished." The Third Circuit, in *United States v. Mazzei*, 521 F.2d 639, 642-43 (3rd Cir.), cert. denied 423 U.S. 1014 (1975) held that the depletion of assets of a firm which conducts interstate activities creates an effect on commerce sufficient to satisfy the Hobbs Act despite the local character of the particular extortionate transaction. The *de minimus* rule was also applied in *United States v. Hathaway*, 534 F.2d 386 (1st Cir.), cert. denied 429 U.S. 819 (1976), 3249 (1976); and *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976).

This Court agrees with the *de minimus* rule applied by the other Circuits. The Act itself suggests that no more than a

minimal effect on interstate commerce need be shown, and the case law is entirely consistent with that language. Moreover, the Court is satisfied that the Government proofs on the issue of intestate commerce meet the requirements of the Hobbs Act.

John Palmer, a real estate broker from Memphis, testified that Tennessee real estate transactions frequently involve purchasers from other states, that real estate listings in Memphis newspapers are widely circulated in Arkansas and Mississippi, and that Tennessee brokers are regulated by the federal government with respect to various housing and loan programs.

Mr. Nasca, who purchased a copy of the exam from Mr. Harding, testified that extensive advertising of Tennessee real estate listing was directed to out-of-state customers, that brokers often made use of a service named Inter-Community Relocation Service, which involves real estate companies in every city of the country, and that fifty percent of the business done by his firm involved people being transferred in and out of Memphis.

Under the facts as described above, the Government clearly established that the extortionate transaction affected interstate commerce. Defendant's argument that the *de minimus* rule creates an unwarranted incursion into the sphere of state criminal law ignores the language and intent of the statute itself. The jurisdictional requirement concerning interstate commerce is satisfied by the facts of this case.

Defendant's contention that his conduct did not constitute extortion as defined by the Act has also been heavily litigated. While this Court agrees with the other courts which have considered the issue and decided that conduct similar to that of Mr. Harding's is cognizable under the Hobbs Act, a few additional words of explanation seem in order.

The statute defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of

actual or threatened force, violence or fear, or under color of official right." An examination of the legislative history of the Hobbs Act helps to add content to that definition. The precursor of the Hobbs Act was the Anti-Racketeering Act of 1934.[1] That Act did not use the word "extortion" to define the proscribed conduct, but rather used the descriptive terminology of the common law offense.[2]

While the Act was passed without formal debate, the House and Senate Reports[3] both indicate the intent of the legislation. The Senate Report stated:

> The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers.

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[1] Act of June 18, 1934, ch. 569, 48 Stat. 979.

[2] The 1934 Act stated, in pertinent part:

> Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use the threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or
>
> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b) . . .
>
> (d) . . . shall . . . be guilty of a felony . . .

[3] H. Rep. No. 1833 and S.Rep. No. 532, 73d Cong., 2d Sess. (1934).

> Such restraints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, whether the restraints are in form of conspiracies or not. The proposed statute also makes it a felony to do any act "affecting" or "burdening" such trade or commerce if accompanied by extortion, violence, coercion, or intimidation.
>
> The provisions of the proposed statute are limited so as not to include the usual activities of capitalistic combinations, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering.

The House Report, which suggested some changes from the original Senate bill, contained a letter from Homer Cummings, Attorney General, to the chairman of the House Judiciary Committee. The letter explained the proposed changes as follows:

> We believe that the bill in this form will accomplish the purposes of such legislation and at the same time meet the objections made to the original bill.
>
> The original bill was susceptible to the objection that it might include within its prohibition the legitimate and bona fide activities of employers and employees. As the purpose of the legislation is not to interfere with such legitimate activities but rather to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce, it seems advisable to definitely exclude such legitimate activities.
>
> As the typical racketeering activities affecting interstate commerce are those in connection with price fixing and economic extortion directed by professional gangsters, we have insterted subparagraphs (a) and (b), making such activities unlawful when accompanied by violence and affecting interstate commerce.

> The Sherman Antitrust Act is too restricted in its terms and the penalties thereunder are too moderate to make that act an effective weapon in prosecuting racketeers. The antiracketeering bill would extend Federal jurisdiction in those cases where racketeering acts are related to interstate commerce and are therefore of concern to the Nation as a whole.

The final version of the Anti-Racketeering Act of 1934 was in fact substantially similar to the version proposed by the House.

Apparently the 1934 Act was not clear enough in its wording and intent, however, because the Supreme Court in *United States v. Teamsters Local 807*, 315 U.S. 521 (1942) narrowly construed the statute to exclude certain types of labor union activity. The immediate response of Congress was to amend the statute to the form currently known as the Hobbs Act.[4]

In the debates surrounding the passage of the Hobbs Act a number of New York Congressmen expressed opposition to the Act because they considered it to be anti-labor.[5] The Act's proponents sought to allay the fears of their colleagues by pointing out that the Act was comparable to the existing law of New York. Congressman Hobbs stated:

> [T]here is nothing clearer than the definitions of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially.[6]

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[4] Act of July 3, 1946, ch. 437, 60 Stat. 420. Actually, the Act was slightly amended again in 1948.

[5] 91 Cong. Rec. 11901-02 (1945) (remarks of Congressman Cellar).

[6] *Id.* 11900.

In fact, the Hobbs Act definition of extortion is similar, although not identical to, New York law as it existed at that time.[7]

A point of critical importance, however, is that many states other than New York had extortion statutes which used the phrase *"under color of official right."*[8] Moreover, while it is true that the debates focused on the New York statute as a point of reference, nothing in those debates leads this Court to conclude that Congress intended to adopt New York decisional law as controlling on the federal courts, particularly since the anomalous New York definition of extortion was not articulated until 1960, some 14 years after the passage of the Hobbs Act.

The leading New York case on extortion is *People v. Dioguardi*, 8 N.Y.2d 260, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960), which held that bribery and extortion are mutually exclusive and that while bribery involves the voluntary giving of something of value to influence the performance of official duty, extortion involves a taking accompanied by duress. The *Dioguardi* distinction was picked up by several federal cases, although none of those cases involved the definitional phrase "under color of official right." See *United States v. Kennedy*, 291 F.2d 457 (2d Cir. 1961); *United States v. Kubacki*, 237 F.Supp. 638 (E.D. Pa. 1965). Rather, those cases suggested that the two prongs of the Hobbs Act definition—"[use] of actual or threatened force, or violence or fear" or "under color

---

[7] The New York statute provides:

> Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right.

Penal Law of 1909, § 850, *as amended*, Laws of 1917, ch. 518, *reprinted in* N.Y. Penal Law, appendix § 850 (McKinney 1967).

[8] See remarks of Congressman Robison of Kentucky, 91 Cong. Rec. at 11906, 11910 (1945); and remarks of Congressman Springer of Indiana, *id.*

of official right"—are meant to be read as interrelated, i.e., that extortion requires an act done under color of official right which is induced by force, violence or fear. The upshot was that cases following the New York interpretation of extortion focused on the victim's state of mind to determine whether an offense committed under color of office was bribery or extortion.

The common law understanding of extortion, however, and its evolution into contemporary statutes and decisions does not require this distinction between extortion and bribery. At common law, extortion was a crime which could only be committed by a public official. *Corpus Juris Secundum* states:

> [I]n the common law the term "extortion" has acquired a technical meaning, and designates a crime committed by an officer of the law who, under cover or color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due. In a more enlarged sense, it signifies any oppression under color or pretense of right[9]

In defining the phrase "color of office," *C.J.S.* goes on to explain:

> [The] phrase [is] generally defined as meaning a claim or assumption of right to do an act by virtue of an office, made by a person who is legally destitute of any such right; . . .
>
> The term is a technical expression, and usually implies bad faith, corruption, breach of duty, or an evil or corrupt motive.[10]

A number of extortion statutes purport to do no more than codify the common law. New Jersey, for example, has interpreted its statute to have adopted the common law meaning of extortion. *State v. Matule*, 54 N.J. Super. 326, 148 A.2d 848 (1959). Other statutes, however, add an additional basis for finding extortion by including any obtaining of property from another with his consent through a wrongful use of force or fear, thus including acts not done under color of official right. Michigan, California and Oklahoma all have extortion statutes which define this additional basis for the offense. *People v. Goodman*, 159 Cal. App. 2d 54, 323 P.2d 536 (1958); *People v. Ritholz*, 359 Mich. 539, 103 N.W.2d 481 (1960); *Yoder v. State*, 493 P.2d 1141 (Okla. 1972).

[9] 35 *Corpus Juris Secundum* 355-56.

[10] 15 *Corpus Juris Secundum* 352-53.

Whether or not their particular statute defines a basis for extortion which does not involve the color of official right doctrine, a number of states have held that extortion based on that doctrine covers a wide range of activity, including what is commonly understood as bribery, and that extortion and bribery are not mutually exclusive. The New Jersey courts have defined extortion as "the wrongful taking of money by a public officer, whether accompanied by 'threats' or not." *State v. Begyn*, 34 N.J. 35, 167 A.2d 161 (1961). See also *State v. Newton*, 328 So.2d 110 (La. 1976); *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), cert. denied 404 U.S. 1058 (1972); *United States v. Hathaway*, 534 F.2d 386 (1st Cir.), cert. denied 429 U.S. 819 (1976). The decisions of Illinois, Kansas and Massachusetts also support such a reading of the law, in that cases decided in those jurisdictions have used the terms "bribery" and "extortion" interchangeably. See *People v. Clemons*, 46 Ill.2d 481, 187 N.E.2d 260 (1962); *State v. Jordan*, 220 Kan. 110, 551 P.2d 773 (1976); *Commonwealth v. DeVincent*, 358 Mass. 592, 266 N.E.2d 314 (1971). Thus extortion defined as the wrongful obtaining of property under color of official right need not include the element of force or duress, and could include such activity as is commonly considered to be bribery.

The fact that the Hobbs Act is drafted in the disjunctive supports an interpretation of the Act which covers the wrongful

obtaining of property under color of official right whether or not accompanied by threats, force or duress. The other Circuits which have considered this issue have all accepted such an interpretation. In *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied 421 U.S. 910 (1975), the court rejected the extortion/bribery distinction and held that the Hobbs Act had been violated by police officers who had set up a scheme of protection money payoffs from bars and other establishments in their district. The court stated:

> The use of office to obtain payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. *See* United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974). It matters not whether the public official induces payments to perform his duties . . . or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.[7]

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[7] As appellants themselves point out, "the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Act are not mutually exclusive." *United States v. Kahn*, 472 F.2d 272, 278 (2d Cir. 1973) *cert. den.*, 411 U.S. 982.

In *United States v. Mazzei*, 521 F.2d 639, 644 (3d Cir.), cert. denied 423 U.S. 1014 (1975), the Third Circuit *en banc* distinguished its own precedent in *United States v. Addonizio*, 451 F.2d 49 (3d Cir.), cert. denied 405 U.S. 936 (1972), reh. denied 405 U.S. 1048 (1972) and held that "[a]ny element of coercion that may be required to establish extortion under the Hobbs Act is supplied by the misuse of the defendant's official power." The First Circuit referred to the evolution of the common law crime of extortion in applying the Hobbs Act

to a scheme involving payoffs to the executive director of a Massachusetts redevelopment authority. *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), cert. denied 429 U.S. 819 (1976). The court first explained why the disjunctive language of the statute permits conviction upon a finding that property was unlawfully obtained either under color of official right or through force or duress. The court stated:

> [W]e find no reason to part company with the other circuits which have considered this question, all of which have read the statute as did the court below. [citations omitted] The statute is clearly phrased in the disjunctive
>
> . . . Further, a disjunctive reading comports with the historical development of the crime of extortion. The "under color of official right" language reflects the common law definition of extortion, which could be committed only by a public official's corrupt taking of a fee under color of his office and did not require proof of threat, fear or duress. [citations omitted] The misuse of public office is said to supply the element of coercion. [citations omitted] Threats, fear and duress became express elements only when the crime was later broadened to include actions by private individuals, who had no official power to wield over their victims.

The court went on to note that bribery and extortion as used in the Hobbs Act are not mutually exclusive. The Tenth Circuit made similar findings in *United States v. Hall*, 536 F.2d 313 (10th Cir., cert. denied 429 U.S. 919 (1976).

This Court is satisfied that the disjunctive language of the statute, the legislative history, and the common law understanding of extortion support the interpretation of the other courts which have considered this matter. Under such an interpretation, the Hobbs Act would clearly include the conduct of which Harding was convicted. This Court's decision in *United*

States v. Yokely, 542 F.2d 300 (6th Cir. 1976) does not require a different result. In that case, this Court held that the armed robbery of a K-Mart Department Store was not within the scope of the Hobbs Act because it did not constitute "racketeering". The concept of racketeering, however, has long been understood to include the obtaining of property under color of official right, as is clear from the focus of the Congressional debates.[11] *Black's Law Dictionary* defines racketeeing as "extortion or coercion" in certain contexts and includes by implication the common law background of extortion. Thus the concepts of racketeering, extortion, and unlawful obtaining of property under color of official right have large areas of overlap which are applicable through the Hobbs Act to conduct such as that of the defendant in this case.

Finally, the Court rejects the defendant's contention that he cannot be convicted for obtaining property under color of office because he in fact had no power to grant real estate brokers' licenses and the persons to whom he sold the exam did not believe that he had such power. The law is well settled that an official need not have the *de jure* power to effectuate the end for which he accepts or induces payment in order to be convicted under the Hobbs Act. In *United States v. Mazzei*, 521 F.2d 639 (3d Cir.), cert. denied 423 U.S. 1014 (1975), the court stated:

> It is clear, of course, that defendant had no statutory power as a state senator to control the granting of leases by state executive agencies. But in order to find that defendant acted "under color of official right," the jury need not have concluded that he had actual *de jure* power to secure grant of the lease so long as it found that Kelly held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved. [citations omitted] Such an exploitation involves the wrongful use of official power that has long been punished at common law as extortion "under color of public office."

[11] See 91 Cong. Rec. 11840-910 (1945).

See also *United States v. Meyers*, 526 F.2d 1033 (7th Cir.), cert. denied 429 U.S. 894 (1976); and *United States v. Hall*, 536 F.2d 313 (10th Cir.), cert. denied 429 U.S. 919 (1976).

Defendant's argument that he had no control over the granting of brokers' licenses merely shows that he had no direct authority over such matters. Through his position as executive director of the real estate commission, however, he had access to the examination, which was the key to obtaining the brokers' license. Selling the exam was but a step removed from selling the license, and it is an artless sophistry to argue that the persons who paid Harding did not believe that they were in effect purchasing a broker's license.

Harding's activity with respect to the selling of licensing examinations was a clear abuse of his office within the proscription of the Hobbs Act. As the court observed in *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied 421 U.S. 910 (1975): "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." Thus defendant's contention that his activity was outside the scope of the statute is without merit. As it has been interpreted by modern courts, the Hobbs Act has become an effective force in the prosecution of venal public officials. This Court sees no reason to differ from the numerous other courts which have found conduct similar to that of Harding's to be a federal offense.

For the reasons herein stated the judgment of the district court is affirmed.

APPENDIX B

United States Court of Appeals
for the Sixth Circuit

No. 77-5030

United States of America,

Plaintiff-Appellee,

v.

Don B. Harding,

Defendant-Appellant.

Before: Phillips, Chief Judge; Engel, Circuit Judge, and Freeman, Senior District Judge.

Judgment

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

Entered by Order of the Court

JOHN P. HEHMAN
Clerk

Issued as Mandate:

COSTS:

Filing fee	$
Printing	$
Total	$

A True Copy.

Attest:

_____

Deputy Clerk

No. 77-610

In the Supreme Court of the United States

OCTOBER TERM, 1977

DON B. HARDING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 563 F. 2d 299.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-16 to A-17) was entered on September 29, 1977. The petition for a writ of certiorari was filed on October 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's extortionate conduct was shown to have affected interstate commerce within the meaning of the Hobbs Act.

STATEMENT

Following a non-jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of two counts of attempting to affect interstate commerce by means of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to concurrent terms of six months' imprisonment and two years' probation on each count and was fined $1,000 on each count (Pet. 5). The court of appeals affirmed in a comprehensive opinion (Pet. App. A-1 to A-15).

From August 1975 through April 1976, petitioner served as the executive director of the Tennessee Real Estate Commission, the state agency that administers the qualifying examination for real estate brokers (App. 25-30, 107).[1] The evidence at trial established that during his tenure as executive director petitioner conducted an ongoing scheme to extort money from applicants for broker's licenses in exchange for improperly providing them with examination questions and answers prior to the test (Pet. App. A-2; App. 104-124, 175-177).

Petitioner's attempt to extort money from two of these applicants, Brenda Kaye Johnson and Donald Nasca, formed the basis for the two counts of the indictment. In February 1976, petitioner met with Johnson, who had just failed in her third attempt to pass the examination, and suggested that he could sell her a copy of the questions and answers to the upcoming examination (Pet. App. A-2). Johnson agreed, but then reported the incident to agents of the FBI, who enlisted her aid in investigating petitioner's activities. At a subsequent meeting, petitioner delivered the

[1]"App." refers to the appendix filed by petitioner in the court of appeals.

exam answers to Johnson in exchange for $300 that had been provided by the FBI (*ibid.*). The FBI also asked Donald Nasca, who had twice failed the examination, to assist in the investigation. Nasca agreed to cooperate, and he, like Johnson, sent petitioner a letter requesting assistance in passing the examination (*ibid.*). Petitioner responded by offering to sell Nasca a copy of the exam, and in April 1976 Nasca paid petitioner $300 for the exam (*ibid.*). Both Nasca and Johnson tape recorded the meetings at which they paid petitioner for the examinations (*ibid.*).

ARGUMENT

In *Stirone* v. *United States*, 361 U.S. 212, 215, this Court observed that the broad language of the Hobbs Act, 18 U.S.C. 1951—which proscribes extortion affecting commerce "in any way or degree"—manifests Congress' intention to use the full extent of its constitutional power to punish interference with interstate commerce by extortion, robbery, or physical violence. Against this background, the courts of appeals have consistently ruled that only a minimal effect on interstate commerce need be shown to meet the jurisdictional requirement of the Act. See, *e.g.*, *United States* v. *Hathaway*, 534 F. 2d 386 (C.A. 1), certiorari denied, 429 U.S. 819; *United States* v. *Mazzei*, 521 F. 2d 639 (C.A. 3), certiorari denied, 423 U.S. 1014; *United States* v. *DeMet*, 486 F. 2d 816, 822 (C.A. 7), certiorari denied, 416 U.S. 969.

Petitioner contends that the court of appeals erred in finding that even a minimal effect on interstate commerce resulted from his conduct because the sale of real estate and the licensing of brokers is solely a matter of state—not federal—concern.

However, as the court of appeals correctly concluded (Pet. App. A-5), at least the necessary *de minimis* effect on commerce was established. The government introduced evidence that real estate transactions handled by Tennessee

brokers frequently involve purchasers from other states, including business and commercial investors, that Tennessee brokers advertise real estate in other states, and frequently make long distance telephone calls in the course of business (App. 160-163). One witness testified that brokers often make use of the Inter-Community Relocation Service, which involves real estate companies in every city in the country, and that at least half of the business done by his firm involved people moving to and from other states (App. 158-164). Indeed, this Court has recognized the interstate nature of real estate transactions, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783-785, and Congress has specifically provided for federal regulation of certain land sales in the Interstate Land Sales Full Disclosure Act, 82 Stat. 590, as amended, 15 U.S.C. 1701 *et seq.*[2]

Accordingly, the court of appeals did not err in concluding that petitioner's scheme to extort money from persons who sought to enter the real estate business—but were unable to pass the state licensing test—affected interstate commerce.[3]

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[2]Although, as petitioner emphasizes (Pet. 9-10), the State of Tennessee regulates the licensing of real estate brokers and the sale of real estate within the State, this in no way displaces the federal legislation intended to bar extortion affecting interstate commerce. Petitioner's reliance in this connection on *Robertson* v. *California*, 328 U.S. 440, is misplaced. *Robertson* holds that under certain circumstances, and where Congress has not acted to the contrary, states may regulate activities of importance to the local community even if that activity affects interstate commerce. *Robertson* does not purport to limit the power of the federal government to act to regulate activities affecting commerce, and, of course, nothing in the Hobbs Act prevents the State of Tennessee from regulating real estate brokerage within its borders.

[3]Petitioner directs much of his argument against the rationale of the decision in *United States* v. *Staszcuk*, 517 F. 2d 53, 60 (C.A. 7), certiorari denied, 423 U.S. 837, which held that the jurisdictional element of the Hobbs Act could be satisfied by showing that at the time of the extortionate transaction there existed a "realistic probability" that commerce would be affected, although the completed transaction did not affect commerce. Since the transactions here did have an effect on interstate commerce, *Staszcuk* is distinguishable, and its rationale is not at issue in this case. To the extent that petitioner suggests that his scheme did not actually affect commerce because the FBI intervened and no unqualified brokers actually passed the exam, he ignores the fact that he was convicted of *attempting* extortionate conduct affecting commerce, not of having succeeded in his endeavors (see App. 190-196). In the case of an attempt, the jurisdictional element is satisfied if it is established that, if the criminal plan had been successfully implemented, its natural and probable consequences would have included an effect on commerce. See *United States* v. *Gupton*, 495 F. 2d 550 (C.A. 5); *Anderson* v. *United States*, 262 F. 2d 764, 769-770 (C.A. 8); *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8). That test was clearly met here.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[4]

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Assistant Attorney General.

JEROME M. FEIT,
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Attorneys.

JANUARY 1978.

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[4]Petitioner does not raise, and this case does not present, the question now pending before this Court in *United States* v. *Culbert*, No. 77-142, certiorari granted October 3, 1977, *i.e.*, whether conduct within the plain language of the Hobbs Act is nonetheless not proscribed by that Act unless it is also proven to constitute racketeering. The court of appeals held (Pet. App. A-13 to A-14) that petitioner's conduct constituted racketeering, because "[t]he concept of racketeering * * * has long been understood to include the obtaining of property under color of official right * * *."